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No. 91-940

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1991

COUNTY OF SAN DIEGO, JOHN DUFFY
AND RICHARD BEALL,

Petitioners,

v.

CLIFTON REDMAN,

Respondent.

Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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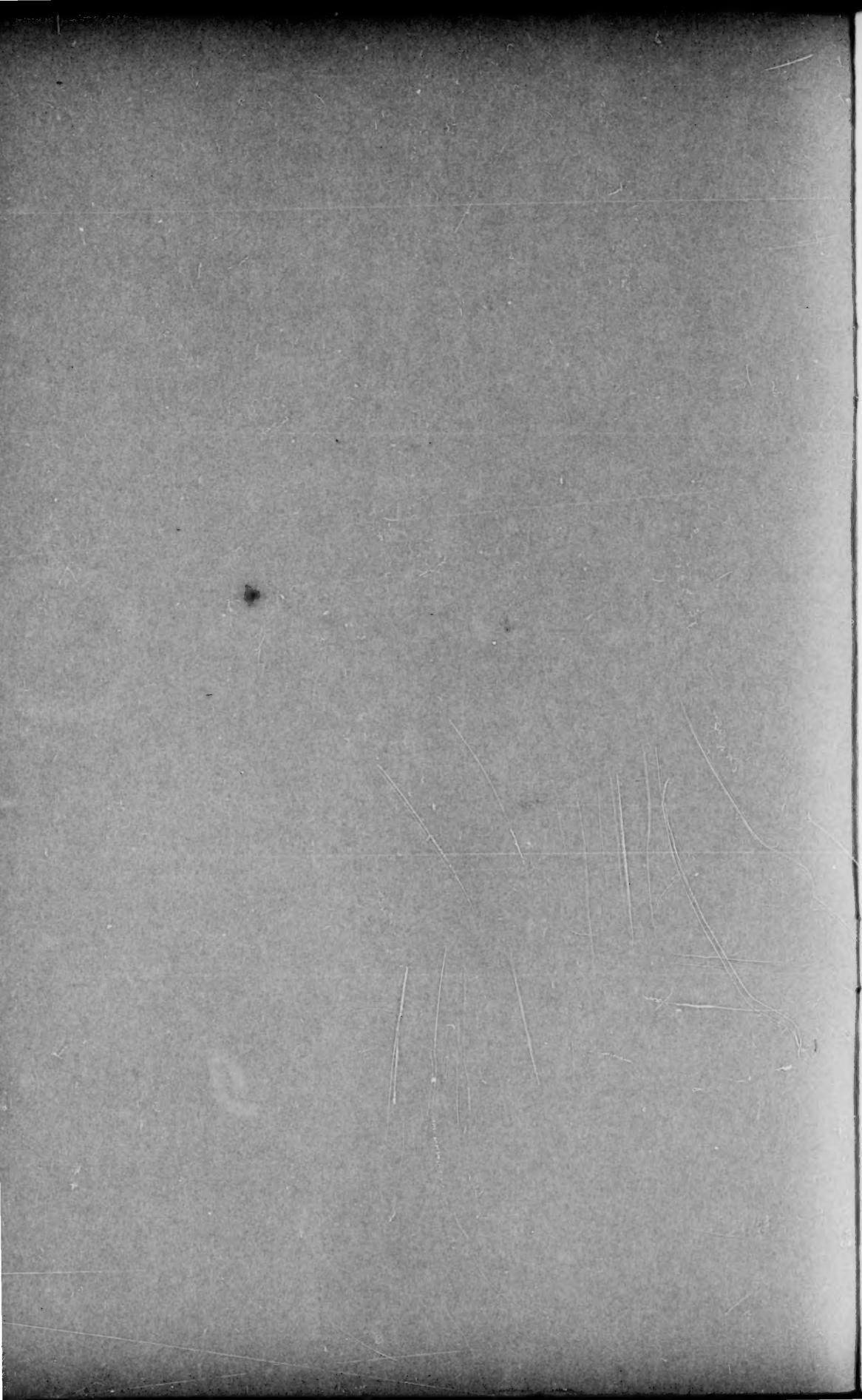


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Respondent, CLIFTON REDMAN, prays that the
Petition for Writ of Certiorari, brought by the Petitioners
County of San Diego, Sheriff John F. Duffy, and Captain
Richard Beall to review the judgment and opinion of the
United States Court of Appeals for the Ninth Circuit,
entered in the above-entitled proceeding on August 26,
1991, be denied.

OPINION BELOW

The en banc opinion of the Court of Appeals for the Ninth Circuit was filed on August 26, 1991. It is reprinted in the appendix to Petitioners brief at page App. 1. The petition for writ of certiorari follows the Ninth Circuit Court of Appeals en banc reversal of a directed verdict in favor of Petitioners. It held that when the evidence is viewed most favorably to Respondent, Redman, there is substantial evidence to find that Petitioners were "deliberately indifferent."



STATEMENT OF THE CASE

Respondent, Clifton Redman, was booked into San Diego County's South Bay Detention Facility (SBDF) in January, 1983. Redman was eighteen years old, a pretrial detainee with no criminal convictions. He was initially placed into a receiving module in the facility which was designated as a "young and tender" unit. He was 5'6" tall and weighed approximately 130 pounds.

Within several days of his arrival, after a minor verbal exchange with another inmate, Redman was transferred by his jailers into an area with the facility designated for the general population, known as a "main-line" module.

Redman was placed into a two-bunk enclosed single cell with an inmate named Kevin Clark. Clark was 27 years old, 5'11" tall and weighed 165 pounds. He was in custody due to a state prison parole violation. He was a sex offender and known by the jail authorities as an

aggressive homosexual. He had been transferred from a homosexual module to the mainline module because he was coercing and manipulating other inmates sexually.

Redman was raped by Clark the first night that he was placed in the enclosed cell with him. Redman was threatened not to say anything or his girlfriend and her family would be harmed. Clark has obtained information regarding Redman's girlfriend and her address from mail he had in the cell.

Redman telephoned his brother and girlfriend the following day and told them of the assault. The mother of Redman's girlfriend, Mrs. Pearson called the South Bay Detention Facility (SBDF) and indicated that she was concerned about Redman's safety, that he was afraid of being sexually assaulted and that threats were made against her family if he said anything. She was unaware that he had been raped at that time.

Mrs. Pearson was told by the jail authorities that they were not operating "a baby-sitting service." The guard, in response to the telephone call, contacted Deputy Green to ask Redman if he was having a problem. Deputy Green called Redman to the deputy station via intercom, and without removing him from the module in view of his assailant asked him if he was having any problems. Redman said no, because of the threats that had been made. There was no further inquiry by jail officials.

Redman was left in the cell with Clark and he was raped by Clark as well as two other inmates from the module, who came into the cell. All three of the attackers were older, larger, prison parole violators. Redman telephoned his brother from an open area within the module,

which is located in front of the deputy station. He was on the telephone talking and crying. The next morning Clark raped Redman again. Redman was released from custody that afternoon.

The three inmates who raped Redman were subsequently charged, and pleaded guilty to sodomy.

Redman brought this action in District Court, Southern District of California under 42 U.S.C. § 1983 against the defendants County of San Diego, Sheriff John F. Duffy, Captain Richard Beall and various sheriff deputies. The District Court directed a verdict in favor of the defendants, in a jury trial. Redman appealed.

A three judge panel of the Ninth Circuit affirmed. Redman's petition for rehearing was granted. An en banc panel of the ninth circuit reversed the court's dismissal as to these Petitioners.

REASONS FOR DENYING THE WRIT

Certiorari should be denied. The en banc decision by the Ninth Circuit held that "a pretrial detainee establishes a violation of the right to personal security under the due process clause of the fourteenth amendment by demonstrating either that prison official acted with 'deliberate indifference' or that their conduct was so reckless as to be tantamount to a desire to inflict harm." The en banc panel correctly held that there was more than sufficient evidence for a reasonable jury to conclude that the County

of San Diego and two of the individual defendants, Sheriff John Duffy and Captain Richard Beall were deliberately indifferent to Redman's right to personal security under the Constitution.

A) The Ninth Circuit Decision held that the "Deliberate Indifference" Standard Applied to Respondent's Case and is in Accord with the Precedent Established by this Court.

The Petitioners contend that greater deference should be given to the institution need to manage the jail facility, and suggest that a standard greater than "deliberate indifference", should apply.¹ The Ninth Circuit decision acknowledges that as part of the weighing process there are circumstances that warrant a standard higher than "deliberate indifference" as stated in *Whitley v. Albers*, 475 U.S. 312 (1986). However, unlike the *Whitley* case, the danger to Redman came from an unprevented attack as opposed to a riot situation where the least restriction may apply in order to insure the safety and control of the institution.

As noted in the Ninth Circuit's opinion, other circuits have chosen the "deliberate indifference" standard for pretrial detainees. See, e.g. *Molton v. Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988), cert. denied, 489 U.S. 1068 (1989); *Colburn v. Upper Darby Township*, 838 F.2d 663, 668 (3rd Cir. 1988), cert. denied, 489 U.S. 1065 (1989); *Anderson v. Gutschenritter*, 836 F.2d 346, 347 (7th Cir. 1988).

¹ It should be noted that Petitioners had previously contended that the applicable standard should be "callous disregard" or "reckless indifference", (Appellee's Brief p. 9).

In the recent Supreme Court decision of *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed. 2d 271 (June 17, 1991), this Court held that for eighth amendment claims of official misconduct in the protection of inmates, the official's state of mind must amount to "wantonness" and that "deliberate indifference" constitutes wantonness.

B) Because the Decision of the Ninth Circuit is in Accord with Case Law Involving the Right to Personal Security There is No Clear Conflict Requiring Supreme Court Resolution

1. The County Can Be Held Liable Under the "Deliberate Indifference" Standard.

A reasonable jury could find the County liable, where the evidence is viewed in the light most favorable to Redman.² The Ninth Circuit held that there is "substantial evidence to support a verdict" for Redman, citing *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985) cert. denied, 475 U.S. 1122 (1986).

There is evidence that the custom and operation of the jail was the moving force in the deprivation of Redman's right to personal security. The County had a policy (or custom) of segregating homosexuals. If an aggressive homosexual was discovered, the County jailers relocated them into the "mainline" population of the jail to protect the passive homosexuals.

² All inferences of fact should be drawn in Redman's favor. *Meehan v. County of Los Angeles*, 856 F.2d 102, 106 (9th Cir. 1988). *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341, 345 (9th Cir. 1978).

Separation of a homosexual known to be aggressive was not done at the South Bay Detention Facility (SBDF) as a matter of policy (or custom). Captain Beall was in charge of the South Bay Jail, he established and approved the procedures. He testified "[i]f we knew about it and had strong reason to believe that he would attack other persons, then we would attempt to isolate him or keep him in a small enough housing unit so he could be observed closer." (Trail Transcript Vol II at 170, 191). However, he further stated that could not be done at the South Bay Detention Facility. He testified "we couldn't do that at the South Bay Jail." The practice was to place aggressive homosexuals in the mainline population.³

Kevin Clark, who attacked and sexually assaulted Redman over several days, was transferred to a mainline tank even though the jailers knew that Clark had been involved with coercing and manipulating other inmates in the homosexual tank and was sexually aggressive. According to his Inmate status report⁴ there was no

³ The stated position by County counsel up to the filing of this petition has been that the policy was to place aggressive homosexuals in the mainline population because it was believed that they could protect themselves, unlike passive homosexuals. This was stated by counsel in his position at the motion for directed verdict. It was further argued by County Counsel in the Opposition to Petition for Rehearing on Rehearing En Banc that "it must be presumed" that the general inmate population is able to resist sexual and coercion from aggressive inmates. (Opp. at p. 3).

⁴ The inmate status report in the official record kept by the jail authorities documenting transfers and status of inmates. The reports "go along with" an inmate as he is transferred through the jail system. (Excerpts of Record Tab 18 p. 189-90).

indication that he was punished for his aggressive behavior of sexually coercing other inmates. Clark's report also states "Since Clark by jail standards isn't required to remain in [the homosexual module] he was placed in [a mainline module]."

Redman was initially placed into a "young and tender" module. The jail had a classification system, however the designation of "young and tender" was a very subjective decision made by a sheriff deputy. "Young and tender" inmates are those inmates who are recognized by the jailers as being more likely to be preyed upon by stronger inmates."⁵

Redman was transferred into a mainline module following a minor incident where Redman had a verbal exchange with another inmate. He was placed by jailers into a double bunked, single cell in the module, with Clark. This was a small cell where Redman and Clark were locked in together every night, with no other persons present. During the day other inmates within the module were allowed in the cells. (This allowed for the other attackers to prey upon Redman).

A deputy station was located outside the module, however the deputy at that location could not see what was happening in the cells. Only on two or three occasions per eight hour work shift would any sheriff deputy actually enter into the module and look into the cells.

⁵ Although the County was able to produce the inmate status reports for the other inmates involved in this incident, mysteriously they were unable to locate CLIFF REDMAN's Inmate Status Report.

Petitioners contend that there is no demonstrated written County policy, regarding placement of homosexuals however, as pointed out in the Ninth Circuit's decision:

"The strongest written policy on homosexuals is in the San Diego County Sheriff's Department Manual of Policies and Procedures, which states 'Homosexual inmates will be isolated from other inmates as necessary' Supplemental Excerpt of Record; see n. 11, *supra* at 11755. We do not read this to require the aggressive homosexuals be segregated from the mainline population. Instead we find that the written policy, as explained by Lt. Beall and County Counsel, intended to protect the passive homosexuals. Moreover, even if it could be said that the general policy applicable to San Diego County Jail facilities was to isolate and observe sexual aggressors, the routine failure (or claimed inability) to follow the general policy at the SBDF constituted a custom or policy which overrides, for *Monnell* purposes, the general policy. The unwritten policy at the SBDF was to put the aggressive homosexuals in the mainline population, because it was assumed heterosexual inmates could protect themselves. See; n.11, *supra* at 11755-57 . . . "6

⁶ Petitioners contend that since there is no documented prior incidents of a sexual assault at the SBDF and they should not be held accountable for this rape. The SBDF had been opened for approximately one year prior to this incident. Their allegation does not address prior incidents of sexual assault at the other jail facilities operated by the County. There was no

(Continued on following page)

There is evidence from which a reasonable jury could find that the policies (or customs) of the County and the jailers resulted in the placement of Clark and Redman in the small cell. Further, that the placing of an aggressive homosexual with Redman constituted deliberate indifference toward his personal security.

2. Sheriff John Duffy Can Be Held Liable Under The "Deliberate Indifference" Standard.

Sheriff John Duffy was in charge of all of the County's detention facilities. The sheriff is required to keep the county jail and is responsible for the safekeeping of prisoners who are held. (Cal Govt. Code § 26605, 26610, Cal Penal Code § 4006).

As stated by the Ninth Circuit Decision "a supervisor may be held liable if there exists *either* (1) his or her personal involvement in the constitutional deprivation, *or* (2) a sufficient causal connection between the supervisor wrongful conduct and the constitution violation" citing *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (citing

(Continued from previous page)

indicated standard operating procedure for the investigation and reporting of rapes within the jail. The Courts have recognized the "under reporting" of rapes and sexual assaults within prisons. *U.S. v. Bailey*, 444 U.S. 394, 462 n.6, 100 S. Ct. 624, 643 n.6 (1980); *Martin v. White*, 742 F.2d 469 (8th Cir 1984). Further, as testified to by Deputy Green there had been assaults including sexual assaults at the SBDF. (R.T. 117-118). Even after the sexual assaults on Redman, when Sheriffs' deputies were aware of his rape, Clark remained in the "mainline" module (R.T. 192).

Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir. 1987) (emphasis added).

Petitioners argue, at page 10 of Petitioners' brief, that Jail officials at SBDF had never before faced the need to house an inmate like Clark and that Clark had never exhibited evidence of aggression toward heterosexual inmates.⁷ There is no evidence to support Petitioner's contention that these jailers had never before faced a need to house someone like Clark.

This is not a case where mere overcrowding is claimed to be constitutional deprivation, rather the facts in the case showed that overcrowding at SBDF prevented Petitioners from being able to segregate known sexual aggressors from other inmates. The SBDF had over 300 inmates even though it was designed for 192 which is 56% over capacity.⁸ The jail personnel at the SBDF acknowledged that at any other county jail facility an

⁷ The jailers had "strong reason" to believe that Clark would attack others, since the reports indicated that he had been involved in coercing others in the jail. Petitioners' assumption that the general inmate population should be expected to protect themselves from coercive sexual assault from a homosexual is unfounded and unreasonable.

⁸ Petitioners requests on Page 9, footnote 5 of the Petition for Writ of Certiorari, that this court take judicial notice of an agreed order entered into in 1988 between the County and Sheriff Duffy, and individual Plaintiffs to set the capacity of the jails in San Diego County. Respondent objects to this evidence being submitted at this time. This was not part of the record or appeal pursuant to FRCP Rule 16. Further, there is nothing contained with the agreed order that addresses a "constitutional" standard or whether double bunked cells are permitted for pretrial detainees.

inmate who was likely to assault others would be isolated or observed more closely but the over crowding at SBDF didn't allow for this. (R.T. at 171 and 209). There was no individual housing at SBDF so someone like Clark could not be isolated. (R.T. 172, 234-35).

As stated in the Ninth Circuit's opinion, "we find that a reasonable jury could find Sheriff Duffy was deliberately indifferent to Redman's personal security rights by allowing overcrowding at the South Bay Detention Facility. Moreover a jury could find that Sheriff Duffy knew or reasonably should have known of the overcrowding at a facility under his administration and that he acquiesced in a deficient policy that was a moving force behind Redman's rape and that repudiated Redman's constitutional right to personal security." (Citing *Hansen v. Black*, 885 F.2d at 646). Additionally, Sheriff Duffy approved the classification policies that were in effect for the jail facilities.

Although not addressed in the opinion by the Ninth Circuit, there are a number of other factors that arguably were part of the circumstances leading to the attack.

The SBDF fell into the classification of a Type II facility pursuant to the California Administrative Code Title 15. (R.T. 171). Title 15 sets forth minimum guidelines by the State of California for the operation of Jail Facilities. (R.T. 169-172). The SBDF was not in compliance with Title 15 in that there were two persons rather than one per cell for pretrial detainees. (R.T. 172).

a) Pursuant to the minimum standards of Title 15 there was to be intermittent observation of the inmates, however, for those inmates in their cells the only visual

contact by Sheriff's Deputies was two to three times per eight hour work shifts when the deputy walked through the module for approximately 10 minutes. (R.T. 215-216, 251) For the approximately 300 prisoners in the facility there were usually seven to nine Sheriff's Deputies on duty during any shift. (R.T. 216-217, and 220).

b) A Station Deputy remained in an enclosed booth and would look into 2 modules with approximately 80 inmates. (Plaintiff's Exhibit 11). The deputy was unable to see into the cells from his station or to see what activities were going on within the cells. (R.T. 244-245). Deputies would sometimes read and watch commercial television while working in the Station Deputy Area during their shift. (R.T. 136).

c) There was a rule that inmates within a module were not supposed to go into other inmate's cells, however, this was not being enforced. (R.T. 231-232). The assaults by the other two inmates occurred in Redman's and Clark's cell, before the locking of the cell at night.

d) The designation of an inmate as "young and unsophisticated" was a very subjective determination made by the intake/receiving Deputy based upon the age, size, charges, and looks of the inmate. (R.T. 175-176). The "receiving deputy" whose job would be to screen and place the inmates was not regularly staffed. (R.T. 221, 222).

Sheriff Duffy knew or should have known of the deficient policies at the SBDF. The operation of the jail was the moving force which resulted in Redman's rape.

3. Captain Richard Beall Can Be Held Liable Under The "Deliberate Indifference" Standard

Captain Beall was the Captain in charge of the SBDF since its opening in 1982. Beall generated and approved all the procedures that were followed at SBDF. He developed the "Inmate Classification Plan", as stated by the Ninth Circuit

"Based on this testimony, a reasonable jury could conclude that Captain Beall developed and implemented policies that were deliberately indifferent to Redman's personal security and were a moving force in the violation of his constitutional rights. Beall assumed that heterosexual inmates are more able to protect themselves from an aggressive homosexual than could passive homosexuals. A reasonable jury could find that such an assumption exhibited deliberate indifference to the potential security risks posed by an aggressive homosexual to heterosexual inmates. The jury could conclude it was deliberately indifferent of Captain Beall to recognize a particular risk to young inmates, yet allow them to be placed in the mainline population. The jury could further conclude that Captain Beall was deliberately indifferent in that he was cognizant of a need to isolate an individual like Clark, yet did not place him in an existing high security module where he would be with inmates of comparable sophistication."

Although Respondent's position is, and has been, that there should be even a greater requirement of care for a pretrial detainee than the "deliberate indifference" standard, the position argued by county counsel through

most of the appeal process has been that the level of "reckless indifference" should apply. They now contend that "reckless indifference" should not apply because it does not demonstrate a deliberate choice.

The Ninth Circuit has imposed a "deliberate indifference" standard. The Ninth Circuit reference to "reckless indifference" in discussing deliberate indifference does not impose a standard less than deliberate indifference. A review of the en banc opinion would demonstrate that the reckless indifference language used by the court is simply to illustrate how some conduct can be so reckless to constitute deliberate choice.

As stated by the Ninth Circuit "reckless indifference" will also establish liability because it is conduct equivalent to a deliberate choice (citing *Whitley*, 475 U.S. at 321).

Footnote 10 in the opinion further states:

"The Supreme Court has defined "wanton" as follows:

'Wanton means reckless - without regard to the rights of others. . . . Wanton means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.'

Smith v. Wade, 461 U.S. 30, 39-40 n.8 (1983) (quoting 30 American and English Encyclopedia of Law 2-4 (2d ed. 1905) (footnotes omitted))."

In this case, the jailers knew of Redman's vulnerability as someone new to the jail system, eighteen and relatively small in size. This is demonstrated by his being placed in a "young and tender" module. They proceeded however, to place him in with Clark who was older, prison wise, a known aggressive homosexual who was coercive and manipulative. Their placement was deliberate and intended. The resulting attack on Redman was probable if not inevitable.

**C) THERE ARE CONTESTED FACTUAL ISSUES
THAT SHOULD BE RESOLVED BY A JURY**

The evidence in this case requires a jury evaluation of the acts and motives of the Petitioner under the deliberate indifference standard. There is a cumulative effect of numerous factors which led to this attack on Redman. A jury should be allowed to weigh the evidence in its totality. Other factors involved include:

1) The undisputed evidence was that Petitioners placed a known sexually aggressive in a locked cell with a young inexperienced inmate, based upon an inability of the facility to isolate a known sexual aggressor.

2) The assaults on Redman were repeated and lengthy. A jury could reasonably infer that the policy of infrequent visual checking of the inmates demonstrated deliberate indifference toward the inmates' safety.

3) The fact that the attackers had a sharpened tooth brush (ER Tab 13) that they threatened Redman with, raises questions of the jails policy of protecting inmates by detecting weapons.

4) The callous manner that the telephone call warning of the danger to Redman, was handled by the jailers⁹, is a factor. The deputy who received the call and responded that the jail was not running a "baby sitting service", a jury could reasonably interpret as reflective of the motives and attitude projected by the administration of the jail facility.

5) The policy and procedure in following up on a report of a pending assault could also be one of the factors that would enter into a juries deliberation.

A jury has the ability to evaluate the government conduct for deliberate indifference and should be allowed to weigh the evidence. From the evidence that was presented a jury could reasonably find these petitioners liable.



⁹ The deputy sheriff who received the telephone call warning of the sexual assault on Redman, was not identified. According to Deputy Green he "could not recall" which deputy called him to ask him to check on Redman, and that whoever called him didn't tell him what the problem was.

CONCLUSION

For the foregoing stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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